

Europlast, Ltd. and Lucile Gauger and Sigrid Laing. Cases 30-CA-10942 and 30-CA-10942-2

October 27, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On June 30, 1992, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²The administrative law judge found that the Respondent acted solely for lawful reasons. Although the judge did not cite *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), those findings satisfy the requirement that a successful defense to a prima facie case consists of showing that the Respondent would have taken the same action even in the absence of protected conduct.

Melvin L. Ford, Esq., for the General Counsel.
John C. Patzke and Albert H. Petajan, Esqs. (Brigden & Petajan), of Milwaukee, Wisconsin, for the Respondent.
Guy-Robert Detlefsen, Jr., Esq., of Wisconsin Rapids, Wisconsin, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried at Portage, Wisconsin, on April 22-24 and July 9-11, 1991. Lucile Gauger, an individual, filed the original charge in Case 30-CA-10942 on May 21, 1990, and amended it on June 14, 1990. Sigrid Laing, an individual, filed the original charge in Case 30-CA-10942-2 on May 29, 1990, and amended it on June 14 and 26, 1990. An order consolidating cases, consolidated complaint, and notice of hearing issued on August 14, 1990, alleging that Europlast, Ltd. (Respondent or Company) violated Section 8(a)(1) and (3) by issuing written warnings to Gauger and Laing, failing to re-

call them after layoff, in order of seniority, refusing to recall Gauger or discharging her following her hospitalization, requiring Laing to perform jobs requiring prolonged standing despite knowledge of a medical condition precluding this activity, and constructively discharging Laing by offering to recall her to work under conditions requiring her to stand for excessive periods all because Gauger and Laing had engaged in union or protected concerted activities. Respondent denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. Briefs were duly filed. On the entire record, my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Plastic Workers Local Union, Local Number 18, AFL-CIO (Union) is now, and has been, at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES PLANT OPERATIONS

Respondent, a corporation with an office and place of business in Endeavor, Wisconsin, is engaged in the manufacture of plastic moldings. Harald Zacharias is president of the corporation and his wife, Olga, is personnel manager. They have held these positions since the corporation was founded in 1985.

The corporation began as a very small business but steadily grew in size to a complement of about 20 employees by 1988. In June of that year, however, Oak Industries, Respondent's most important customer, responsible for 60 percent of its business, suddenly broke off the relationship. The remaining business was insufficient to cover overhead expenses and Respondent almost had to close its doors. It was strongly suspected that the loss of the Oak Industries account was the direct result of disloyalty among certain members of Respondent's management. There was also evidence of sabotage or planned sabotage of Respondent's product. These events resulted in certain changes in management personnel as well as the retention among some of the remaining members of management of a suspicious attitude toward the rank-and-file employees.

Back in 1986, Respondent had bid on a contract with Consolidated Papers to produce plastic rotors for the tops of Kraft cheese containers. Included in the quotation were wages to be paid to the machine operators. The inclusion of these proved prohibitive and Respondent was not awarded the contract.

In July 1988, Respondent made a second attempt to secure Consolidated Papers as a customer and was successful. At this time, Respondent was in serious financial difficulty. Its machines were down due to the loss of business because of

the Oak Industries fiasco. Respondent's bid was based on feedback from Consolidated which included a price range that Respondent should try to attain in order to get the job. To meet the suggested price range, Respondent had to figure the job without the inclusion of wages for the machine operators whom the president of the Company felt it could do without. It was hoped, at the time, that equipment could be added which would eliminate the need to employ machine operators.

Respondent realized when making the bid that if it had to employ machine operators on the Consolidated Papers job, it would not be a profit-making job. It would, however, help to pay the overhead because it was better to have the machines running to help pay the overhead than to not have them running at all.

Respondent began production on the Kraft rotors, an 8-ounce size and a 3-ounce size, in November 1988. Although it was not initially anticipated that molding machine operators would be used on the job, Respondent had not yet obtained the new equipment being considered, so it was necessary to employ these employees. According to the credited testimony of Harald Zacharias, the configuration of the mold was such that besides producing the products, the machine was also producing waste materials called runners which were not to be shipped to the customer but rather reground along with new material, then reused in production.

The primary duties of the machine operators who worked on the injection mold machine on the Kraft rotors was to separate the runners from the products, and to inspect every rotor that was coming by to make sure that each was perfect with no short shots¹ or damaged products. The use of the machine operators on the Consolidated Kraft rotors did not, however, work out to Respondent's satisfaction. There were continuing complaints from the customer about the quality level of the product shipped to it by Respondent. It found short shots, bad parts, runners, and parts of runners in the boxes of products shipped to them. These were not discovered on receipt but in the sorting part of their high-speed assembly equipment where they were jammed in, resulting in a number of breakdowns. The customer's equipment is geared to run at 300 pieces per minute, and a breakdown is a serious matter.

By early 1989,² Respondent was running five injection mold machines with machine operators manning them, doing the job immediately described above, albeit not satisfactorily. To solve the problem caused by the failure of the machine operators to intercept runners and faulty pieces, Respondent, in May, began to solicit quotations from various companies to supply it with equipment to automate its production. That month it received a quotation for a conveyor and separator to do the job of the machine operators. However, the equipment proved too expensive. The search continued into June, but again, what was available was not worth the investment.

In July, Respondent employed, on the average, 10 direct employees who were classified as either machine operators or material handlers. None of these employees, however, was able to do a complete mold setup. Only Pat Pejskar, the molding department manager, and the shift supervisors were capable of doing this job. Pejskar, who had experience in

other plastics plants, found this unusual and was dissatisfied with this situation. For some time he had planned to give some of the material handlers experience in this line of work and, when he became molding department manager, he told them so. In late August or early September, Pejskar and Olga Zacharias³ drew up a schedule under which material handlers would receive training and gain experience as mold setup men. As they gained experience, they would receive additional compensation. However, because of various other duties assigned to them, the material handlers were not spending a whole lot of time with the supervisors learning mold changes, and the schedule was not being adhered to. Pejskar, with input from his supervisors, then decided to develop an employee who would just run the floor, do all kinds of floor duties—making and stacking boxes, dumping grinders, labeling, weighing and keeping the floor clean. This would give the material handlers, who had been performing these tasks, more time to spend with the supervisors learning mold changes.

This was the situation at the Company in October when the Union made its appearance on the scene. Respondent had already determined to automate in order to eliminate the machine operators' jobs and was giving consideration to creating floor persons' positions to free the material handlers to learn the mold setup job.

Until automation could be effectuated, however, the machine operators and material handlers continued, in the fall, to perform their duties as before. Three operators would usually be running the machines while one would be performing floor duties. If all four operators were on the machines, the material handler or the maintenance man would perform the floor duties. Lifting boxes was one of the floor duties. The lifting of smaller boxes of 3-ounce rotors and drawers of material was easy and the machine operators, all women, were quite able to do this. The lifting of larger and heavier boxes was done by the men—a material handler, supervisor or anyone who was around to help the operators. Meanwhile, Respondent continued to receive quotations for conveyors with separators from various suppliers, some to use in the production of Kraft rotors.

Toward the end of 1989, Respondent lost several contracts for the production of parts which were full-time operator jobs. One was a suction cover for Whirlpool which required a secondary operation where an operator had to manually remove a part from the press and throw it out. A second one was a faucet handle for Kohler which also required an operator to perform a secondary operation. The loss of these contracts resulted in a loss of work for the machine operators. This, in turn, resulted in a layoff on or about December 15.

Recall of employees began gradually as of January 2, 1990.⁴ Machine operators, quality control employees, material handlers, and other employees were called back to work, a few at a time. By this time, some automation had taken place but not yet enough to eliminate the machine operators' positions. Similarly, the plan to relieve the material handlers of the floor duties to enable them to do setup work and mold changing had not yet been accomplished although the situation had been relieved somewhat by partial automation.

¹ Incomplete or not fully molded parts.

² Hereinafter all dates are in 1989 unless otherwise noted.

³ Hereinafter, Olga.

⁴ Henceforth, all dates are in 1990 unless noted otherwise.

Pejskar, whose ideas these were, was disappointed in the lack of progress in both areas.

Pejskar determined to put his plan into operation. He was going to create a new job title called "floor person" who would do all of the floor duties performed by the material handlers and the machine operators, when they were not doing machine operators' duties. The new position was to have more responsibilities than the machine operators but less than the material handlers who would then be doing setup work. The floor person would consequently be paid more than the machine operators but less than the material handlers. The president of the Company offered Pejskar his full support.

The orders that Respondent was obtaining in January 1990 were mostly automatic work, work that did not require machine operators, machines running unattended. Respondent therefore decided to fill the floor persons' positions with machine operators and not replace the machine operators' positions as they became vacant. It was planned to reduce the number of machine operators, one per shift, by attrition through promotion.

In January, Respondent continued its automation program. It bought a new, more modern, injection molding machine which was more fully automatic. It produced parts more rapidly and of better quality. It purchased an add-on separator, for the Kraft operation, which was attached to a conveyor already in operation. It was hoped that once this became operational, there would be no further need for machine operators to sit at the machines. The savings in labor costs were expected to be considerable.

Also in January, at a staff meeting, Pejskar placed before the members of management his plan to create the position of floor person. He was hoping to get a good reaction and it was generally favorable. There was some question of the cost factor, however, so he later approached Olga, to discuss both the wages and responsibilities connected with the new position. Pejskar hoped to pay the floor persons 50 cents per hour more than the wages then paid to the machine operators. Because those wages would be less than those received by any employee except the machine operators, it was assumed only machine operators would apply for the job. Olga and Pejskar decided that the floor person's position was to be filled on the basis of plantwide seniority. Any individual who felt she could handle the job would be given the job if she were most senior.

On February 5, Respondent posted the following notice:

Notice of Available Position

Position: Floor person—1st 2nd and 3rd shift

Major Responsibilities:

Packaging-labeling-inspecting-sorting
Weighing boxes
Dumping grinders
Giving breaks
Making boxes
Cleaning

Requirements:

Ability to lift 50 pounds on a regular basis
Basic arithmetic skills

If you are interested please sign your name below by

02/08/90 3:00 p.m.

Eight machine operators signed the notice, thus applying for the position. Beginning about February 9, each of those who signed was called in for an interview by Olga and Pejskar, in accordance with her seniority.

After the interview with Gauger, discussed in detail, *infra*, they next spoke with Donna Hinze, Anna Jones, Cindy Stahmer, Edith Demerath, Victie Powers, and Jodi Martinez in that order. Pejskar explained to each of them, the duties they would be performing, including the lifting requirement. Following each interview, each employee was given a sheet of paper containing the terms of an agreement whereby they accepted or rejected the position being offered.

You are being offered the position of floor person. This position became open on February 05, 1990, was posted for 3 days ending at 3 p.m. on February 08, 1990. You are the most senior employee to have applied, a copy of the posting list is attached to this offer. The posting list describes the duties required of you.

By your acceptance of this offer you are representing to us that you are capable of performing all of the duties listed. Specifically you are stating that you can do the following:

Packaging-labeling-inspecting-sorting
Weighing boxes
Dumping grinders
Giving breaks
Making boxes
Cleaning
Lift objects weighing 50 pounds on a regular basis
Have a working knowledge of basic arithmetic skills

If you are unable to perform this job satisfactorily because you do not have the skills or requirements listed above, Europlast, Ltd. cannot guarantee you an alternative position in the Corporation.

I have read the above,

I accept the position _____

I reject the position _____

I understand that I am leaving the position of machine operator and that that position is being eliminated.

After Gauger rejected the position, Donna Hinze accepted it. Since Hinze had the most seniority after Gauger, she was given her choice of shifts and chose the first shift. She was still employed as a floor person at the time of the hearing.

Anna Jones was the next employee interviewed. She, like Gauger, rejected the position.

Cindy Stahmer was interviewed next and since Respondent, at the time, intended to employ just one floor person on each shift, she was given the choice of working on the second or third shifts. She chose the third shift.

Sharon Johnson had signed the notice but later scratched her name off because she was not sure she could lift 50 pounds. Subsequently, she asked to have it reinstated. She was interviewed next. There was no longer a choice in shifts so she accepted the second shift, the only one still available.

Although Hinze had accepted the floor person's position, she was scheduled shortly to undergo surgery and hospitalization for about 6 weeks. Consequently, Pejskar requested employee, Edith Demerath, to take Hinze's place on a temporary basis. She did so and eventually was made a permanent floor person. Cindy Stahmer also replaced Hinze on the first shift for a time.

By late February and early March, it became clear that the newly installed equipment was successfully operational and the need for dedicated machine operators had disappeared for certain products, the Kraft rotors in particular. Management felt that it could safely do away with two more machine operators from each shift and work with just one machine operator and one floor person per shift. Some jobs still needed a machine operator but most did not. Those that did need a secondary operation, after the mold machine released the part, would require the machine operator, perhaps, to close or clip the product, but not ordinarily to inspect parts for defects. The secondary operation was usually done at a separate table, 5 or 10 feet from the press, with a special tool.

In mid-March and again in late March, Respondent placed additional orders to further automate production. The new purchases were expected to further decrease the number of floor duties performed by material handlers and operators. The new machinery would also totally automate the Kraft production making the employment of machine operators virtually superfluous.

Respondent, toward the end of March, still employed five or six machine operators including Gauger who at this time was on sick leave. It was estimated that elimination of these jobs would save the Company approximately \$100,000 per year. Based on this consideration it was decided to totally eliminate the position of machine operator. This was done March 30, when seven operators' jobs were eliminated, two on each shift, and the operators, themselves, permanently laid off. Only one of the seven machine operators was rehired and that was not until a year later when Anna Jones was rehired as a floor person.

Since the March 30 layoff, Respondent has produced parts, though not Kraft parts, which require someone to do traditional machine operator's work. This work has usually been done by a floor person. Although the amount of operator's work available has fluctuated, depending on how orders came in, the floor person has averaged 5 or 6 days per month doing it. Sometimes the material handler or supervisor would then help with the floor duties if the floor person was busy with machine operator type work. On one occasion, temporary employees were hired to do some machine operator type work but were terminated after May 31. No regular employees have been hired or rehired⁵ since the March 30 layoff, either as machine operators or in any other category, to compensate for the loss of the laid-off machine operators.

Since March 30, Europlast's sales have, on the average, increased while the number of employees and employee hours have decreased.

Before the elimination of the machine operators' positions and the creation of the floor persons' positions, the material handlers were told of these decisions and the effect that these decisions would have on them. Pejskar and Thunder both

told material handler, Nathan Haley, that the floor person's job was being created so that he would have more time to learn the mold setups. Pejskar told Haley that he had 6 months to learn the basics and that if he failed to do so, he would lose his job.

After the floor persons' positions were created, it did have the impact on Haley's job that Pejskar intended. It freed up his time to learn the mold setups. He no longer had to watch the floor, make boxes or weigh them. He no longer had to dump the grinders. These duties were now performed by the floor persons and were done successfully with very little help from the material handlers.

When Gauger had floor duties to perform, before the creation of the floor persons' jobs, she would stack the boxes three high, but leave the fourth one set, and one of the men would lift it for her when he came by. After she became a floor person, Johnson lifted the 50-pound boxes herself, although Haley, "once in a while" would put a box on a skid, just to help out.

In April, despite Respondent's confidence in its automated system, a number of defective Kraft and Presto parts were produced. This was brought to the attention of management by Respondent's customers. As a result, management put operators back on the machines. Operators were also required when part of the equipment broke down. This was in May. The employees doing the operator tasks were the floor persons.

Throughout June, operator duties were performed by the floor persons on an occasional basis, which duties sometimes became substantial. In each case, however, the amount of machine operator work to be done was never so great that it could not be accomplished by the floor persons with help from the material handler or supervisor doing some of her floor duties. Respondent never had to hire or rehire additional employees to do the machine operator type duties. As far as the type of floor duties required, they remained the same, including the necessity of lifting up to 50 pounds, waist high or higher, with only rare help from the material handler.

In the following months, Respondent continued to operate as it had before. The occasional need for the performance of machine operators' duties was fulfilled by the floor persons. Respondent continued to purchase automating equipment. The number of employees and hours worked remained low, and sales remained relatively high.

In February 1991, the position of assembler became available. A notice was placed on the bulletin board in order to fill the position, the standard procedure. A floor person bid on the job and won it. A former employee, Anna Jones, applied for the newly available floor person's job and was given the position. The assembler's position was a new one which had not been available before March 1991.

As of the date of the hearing, the material handlers, one on each shift, were successfully changing molds, some without the help of their supervisors. They average one change per shift, sometimes two. Depending on the mold involved it takes them from 1 to 8 hours to make a change.

Sigrid Laing

Sigrid Laing was a friend of the Wysznewskij family long before she began working for Respondent. In fact, she obtained employment with Respondent through this friendship.

⁵ An exception is the rehiring of Ingrid Butler in May 1991. The record is unclear as to the position into which Butler was rehired.

Initially, when she asked for work, there was nothing available for her. She had a particular physical disability which did not permit her to stand for extended periods of time and Respondent had no openings which were sitting jobs. Later, however, in December 1988, she was advised that there would be some openings for sitting jobs in early 1989⁶ and would be hired at that time.

In January, she began work with the understanding that she would not be required to stand for more than 1 hour at a time. Olga made a notation to this effect on Laing's application when she first applied. Laing also provided a note from her doctor which requested that she be scheduled to work 2 hours sitting and 2 hours walking around.

As noted in the earlier section of this decision, the machine operators performed not only their inspecting duties, but also had to perform certain floor duties—packaging, labeling, inspecting, sorting, lifting, sealing, and stacking boxes. Laing, because of her disability, was reluctant to perform these floor duties because they required her to stand. Nevertheless, she, like the other machine operators, was required to rotate and take her turn performing floor duties. She did this during the winter and spring of 1989, according to her supervisor, Pat Pejskar, but not according to Laing who testified that she rotated from machine to machine but did no floor duties. I find that Laing did perform some floor duties but reluctantly and not her full share.

In March, Respondent learned that a large number of defective rotors were being received by Consolidated along with runners and other junk, packed in the boxes of ordered parts. This was the fault of the machine operators who were supposed to keep these defective pieces from getting into the shipment. There was no way, at the time, to determine which of the operators was responsible because only the inspector's name appeared on the label, not that of the machine operator and the inspectors were not responsible for catching defective parts and runners before they got into the box. Additional bad parts were shipped in April.

On April 24, Consolidated returned some samples of defective 3-ounce rotors and requested that steps be taken by Respondent to see that the problem was not repeated. William Higgins, Respondent's quality control manager, received this complaint from Consolidated but could not identify which of the machine operators was to blame for letting the defective parts get through because they were rotating among the various machines and floor person's duties, so that any one of them might have been responsible.

When Higgins showed the returned parts to Harald Zacharias and Respondent's vice president, Nick Wysznewskij, they were both upset. They could not believe that an operator could sit next to the conveyor and let such junk go by. They concluded that it was no accident, but sabotage.

In addition to the April 24 letter, Consolidated's resident engineer, Art Thorson, called personally to complain about the defective parts.

On May 10, Consolidated's buyer, J. P. Randall, wrote again to Higgins referring to Higgen's conversation with Thorson, and advising him of more recent problems with both the 8- and the 3-ounce rotors. Samples accompanied the letter. He suggested a review of Respondent's quality control

procedures and requested a written response as to how Respondent intended to correct the situation.

As a result of the April 24 and May 10 complaints, Respondent called a meeting of all employees. Harald Zacharias and Nick Wysznewskij addressed the employees. Zacharias told the employees that Consolidated was a very important customer, especially since the loss of all the Oak Industries business. He explained that Consolidated was its bread and butter job and Respondent could not afford to lose it because of someone not doing his job. Although Zacharias had made up his mind that if he found out who was responsible for shipping the defective parts, he would fire him, he did not threaten to do so. Wysznewskij threatened that if he caught "the bastard" who was responsible, he would kill him.

After the May meeting, it was determined that henceforth, the machine operator responsible for a particular box of rotors would have her initials placed on the box. On May 15, Higgins replied to Randall's May 10 letter and advised Consolidated of the steps it had taken to insure the quality of its product.

In early October the machine operators on the second shift were Sigrid Laing, Sharon Johnson, Rhonda Stahmer, and Kim Prate. Johnson worked by herself on a special project for the Kohler Company. Stahmer and Prate rotated among the various machines and the floor duties. This was a system which they had worked out between themselves. Laing usually remained at one or another of the machines, sitting while performing her machine operator's duties but seldom performing the floor duties which Stahmer and Prate had to do by themselves, in rotation.

Eventually, Stahmer and Prate took exception to the fact that Laing seemed to enjoy a favored position among the machine operators. They objected to the fact that she did not perform her share of the floor duties. When they began to argue with Laing, complaining that she would not rotate with them, Laing explained that she could not do the floor work because she could only work while sitting. Though she explained the problem she had with her leg, Stahmer and Prate continued to complain.

Tired of the complaints of her coworkers, Laing reported their badgering to Pejskar. She told Pejskar that they should not be allowed to tell her what to do and that due to the condition of her leg, she should not be required to stand. She explained that if she were forced to stand for extended periods, her leg would swell and blood clots would form. She informed Pejskar that she was under doctor's orders not to stand.

The other machine operators also complained to Pejskar. They reported that Laing refused to perform floor duties and that she should be made to rotate along with the other machine operators.

Pejskar, annoyed by the constant bickering, called all of the machine operators into his office. He told them that they would have to work out a schedule for themselves or else he would do it for them.

Despite Pejskar's warning, the operators failed to work out a schedule satisfactory to all. Pejskar, therefore, assigned them a schedule which they were required to follow. Under Pejskar's schedule, Johnson continued working solely on the Kohler product. The others, Laing included, rotated. Each machine operator would work 2 hours on one machine, take a break, then move on to the next machine or to perform

⁶Hereafter, all dates are in 1989, unless noted otherwise.

floor duties for 2 hours. No one, according to the credited testimony of Johnson and Stahmer, had to perform floor duties for more than 2 hours at a time.⁷ Laing testified that Pejskar's rotating schedule was put into effect on or about October 23.

Pejskar, in the meantime, went to Olga and informed her of the problems he was having with the squabbling among the machine operators. He told her that he wanted a doctor's excuse concerning Laing's condition because he had to know the truth as to whether Laing was able to perform the duties required. After his discussion with Olga, Pejskar did not pursue the matter further but left it to Olga and the second shift supervisor to handle. Laing did not approach him again with regard to the subject.

On October 24, Laing complained to her supervisor that she should not be standing for long periods of time and could not do any lifting. A week later, she spoke to Olga and Nick Wysznewskij⁸ about her having to rotate and to stand while performing the floor duties. She explained that her leg was swollen and that she was having a lot of pain. Wysznewskij suggested that she obtain a doctor's excuse. Olga, too, suggested that Laing obtain a doctor's statement containing a description of any restrictions on her ability to perform her duties.

On November 1, Laing brought in a doctor's excuse which read:

To Whom It May Concern:

This is to certify that Sigrid Laing has a history of chronic thrombo-phlebitis and pulmonary problems. It would be a risk to her health to work where she has to stand for more than two hours.

The note, which was signed by Laing's personal physician, V. C. Guzman, was given to Olga.

When Olga read the doctor's excuse, she decided that clarification was required. She did not know if by "standing," the note referred to standing in one place or to walking around, just being on one's feet. She did not know what was to happen after 2 hours, whether a break was required and, if so, how long. She did not know, if after 2 hours, whether Laing should be given a sitting job.

Olga spoke to Laing about the doctor's excuse, the same day or the day after, and told her that she still had some questions. She asked Laing if it would be all right for her to contact the doctor and talk to him directly. Laing agreed to this procedure.

Olga called Dr. Guzman on November 2 and talked with him. She told him that she did not quite understand what he meant in his note. She asked him if he meant by "standing," standing in one spot. He replied that he did. She asked him if it would be all right for Laing to be moving around, walking around making boxes, packing, taping, putting boxes on the scale, and moving around from machine to machine. Guzman said that would be fine, and added that actually, that would be the best thing for her to do, that it would be very good for Laing to move around. Olga then asked Guzman how long the break had to be and he replied that the length of the break should be determined by how Laing felt. Olga confirmed her understanding of her conversation with

Guzman, in a letter addressed to him, dated November 3. In her letter she requested Guzman to advise her immediately if her understanding was incorrect. Guzman did not reply.

Subsequently, in still another conversation between Laing and Olga about Laing having to stand, Olga reported to Laing what Guzman had said. She told Laing to get another note if she did not agree. Laing did not do so. Thereafter, there were no further discussions on the subject and although Laing continued to suffer from her painful swollen leg, she performed the duties required. Despite the problems concerning rotation and Laing's reluctance to stand while at work, she was described as a good worker by her supervisor. Back in July 1989, Laing had received a favorable evaluation.

Meanwhile, it was during this period of squabbling among the machine operators on the second shift that the Union made its appearance. Gauger met with a union representative on October 17 and that evening gave Laing 8 to 10 union cards to distribute. Subsequently, Laing gave three of them to other employees. This, and her accompanying Gauger on union business, was the extent of her union activity.

On November 14, while Laing was working on the floor, lifting a box up to the wall, she received a sharp pain, a burning sensation, in her right arm. She complained to the quality control girl, Sandy Millard, that she felt like acid had been spilled on her. Millard advised Laing to go to the restroom and wash it off. After she did so, her arm began to swell. She went to the office to show Olga who suggested that Laing might have a broken blood vessel. Laing replied that if it were a broken blood vessel she should see her doctor because she was on blood thinners and could bleed to death. Olga put ice on Laing's arm and wrapped it in a towel. She then called Guzman and made arrangements to have him see Laing at the emergency room at Divine Savior Hospital in Portage and personally drove her there.

Olga remained with Laing while Guzman examined her. Thereafter, Guzman ordered Laing to go home and not to work for an indefinite period. Laing remained on sick leave until December 11.

The incident involving Laing's injury on November 14 is relevant to the case for two reasons. First, the care and concern shown by Olga for Laing in treating and transporting her belies any serious animosity toward her because of activity on behalf of the Union. Second, at no point while Guzman, Laing, and Olga were together at the hospital did anyone bring up Laing's restrictions while performing her floor duties. There was no mention of hours spent standing or sitting or of her discomfort which she probably would have mentioned if she had been in as much pain as she claimed.

On December 7, Guzman wrote another note on Laing's behalf:

To Whom it May Concern:

This is to certify that Sigrid Laing has been under my care. She may return to work on 12-11-89. She should be on light work. Absolutely no heaving [sic] lifting.

On December 11, Laing returned to work and presented the doctor's note to Olga. Olga, in turn, told Laing's supervisor that she was to be on limited duty with no heavy lifting. Olga testified that she did not know what kind of work

⁷ Laing's testimony to the contrary is not credited.

⁸ Respondent's vice president.

Laing's supervisor assigned her when she returned but received no complaints from Laing that she was being required to work outside her work restrictions. Sharon Johnson testified that, after Laing returned from sick leave, she did not observe her working the floor or doing any heavy lifting. She stated that Laing told her that she could not work the floor because she had a lifting restriction.

Rhonda Stahmer testified that the machine operators, at this time, ordinarily worked 2 hours and were then given a 12-minute break. The employee doing the relieving would then stay on that machine and the employee relieved would rotate to the next machine or to floor duty.

Contrary to the testimony of Olga and Sharon Johnson, Laing testified that, when she returned on December 11, she did both floor jobs and machine operator jobs. The floor jobs included lifting boxes weighing 35 to 50 pounds, stacking them four or five high to chest level, 2-1/2 feet off the floor. She testified further, contrary to Stahmer, that she had to do this work for 4 hours at a time before rotating back to the machines and that there had been a note on the bulletin board to the effect that if the 2-hour rotation did not work out, the rotation would be every 4 hours.

With regard to the issue of whether or not Laing was required to perform floor duties on her return from sick leave on December 11 and thereafter, I credit the testimony of Olga and Johnson over that of Laing. Laing went through the trouble of obtaining the note from Guzman so that she would not have to do any heavy lifting. I am certain that if the note were ignored and she were required to do heavy lifting, as is required of employees performing floor duties, Laing would have complained, just as she had on previous occasions. Olga credibly testified that she received no such complaints from Laing on her return and there is no testimony or evidence to the contrary.

Further, Olga showed great care and concern for Laing when she first injured her arm. It would be out of character and contrary to her past sympathetic approach toward Laing's wrist injury to force her to lift heavy boxes with her injured arm, at least not without first checking with Guzman.

Finally, in the face of Olga's credited testimony that she did not know how Laing intended to vote in the forthcoming representation election, a matter discussed *infra*, it would be absurd for her to maltreat Laing 2 days before the election.

During the organizational campaign, prior to the election, members of management discussed among themselves, the way they thought Laing, among others, would vote. Their opinion changed as events changed. Initially, management felt that Laing, as a longtime friend of the family, would vote against the Union. Moreover, on October 18 or 19, the day the union representative first appeared at Respondent's driveway, as Olga walked past Laing's work station, Laing drew Olga into conversation by asking her what she thought about "everything that was going on," obviously referring to the employees' union activity. When Olga declined to discuss the matter, Laing persisted by saying, "Well, just as friends." Olga then replied, "No, I can't discuss it." Then, according to Olga's credited and undenied testimony, Laing said, "Well, I just wanted to let you know, I have nothing to do with it and I feel bad about it." Based on these two considerations, Olga believed that Laing was not on the side of the Union.

Analysis of the situation as of October 18 or 19 is beneficial. Laing professes to Olga her total loyalty to her employer and her noninvolvement with the Union. If her profession to Olga was true, then her testimony that she had obtained and distributed union authorization cards, and signed one herself, is false. If her profession of loyalty was false, then she was being most disingenuous, and probably attempting to entrap Olga into making statements which could be used against Respondent at a later date. In either case, I find Laing's credibility seriously undermined by the circumstances. Moreover, certain questions remain unanswered: Why were no employee or union witnesses called to support the testimony of the alleged discriminatees that they were heavily involved in the union campaign and why were no authorization cards submitted to help clarify the sequence of events.

Though Laing was initially thought to be procompany, as the conflict regarding her medical handicap, limitations, and work assignments heightened, Olga felt that Laing's unhappiness might result in her voting for the Union. Also, Olga considered the fact that the other people on the shift were unhappy with Laing and were complaining to Olga about her. Olga reasoned that if Laing were involved in the union organizing, she would do more to get along with them. So, Olga testified, she really could not decide which way Laing would vote. Olga completed her testimony on this line of questioning by stating that no member of management ever saw Laing engage in any sort of union activity and denying that she ever was a part of any management discussion concerning any plan to punish anyone who was involved in union activity.

The election took place on December 13. There were 22 eligible voters. The tally of ballots indicated six votes for the Union, two challenged ballots and the rest against the Union. The Union did not have an observer and did not file any objections.

After the election, a management meeting was called at which it was determined that the same conditions should remain in place as were in effect before the election. No employees should be questioned, punished, or rewarded as a result of their sympathies or activities on behalf of or against the Union. The election was to be the end of it and Respondent was to go on with its business.

Prior to the election, on or about December 8, Respondent received from Consolidated Papers an envelope containing 15 3-ounce rotors which had been found in with a box of 8-ounce rotors. Either accompanying the rotors, or received later at Respondent's request, was a tag identifying the responsible machine operator as Sigrid Laing.

The inclusion of the 3-ounce parts would be as damaging to Consolidated's production process as would be the inclusion of runners or other scrap. The 3-ounce rotors were covered with oil.

At the regular Monday morning staff meeting, on December 11, the problem was discussed among the various members of management in attendance. Two of them were in favor of dismissing the operator whose name appeared on the tag attached to the bag of 3-ounce rotors. They reasoned that it was inconceivable that the 3-ounce parts could be in an 8-ounce box without somebody putting them in there on purpose because the two sizes of rotors cannot be produced at the same time. However, Pejskar told them that he was the

molding manager, and it was his decision to make, not theirs. He said that he would conduct an investigation to determine how the 3-ounce rotors could have gotten into the 8-ounce box. The others agreed.

Before Pejskar had an opportunity to undertake his investigation of the situation, Rich Thunder, Laing's supervisor, came by her machine and told her that something had been found in one of her boxes and that she would probably be written up. Laing pleaded that there was no way that could happen. Thunder remarked, "Don't blame me. It wasn't my fault."

Since Thunder did not identify the "something" found in Laing's box, she assumed that he was referring to a runner. While going on break later that day, she told Sharon Johnson that she was being written up because runners had been found in her box. She told Johnson that she, Laing, was scheduled for layoff⁹ and that she would not be coming back after the layoff¹⁰ because she did not get along with Stahmer and Prate and because of the runners found in her box.

Johnson testified that she was not surprised to hear that runners had been found in Laing's box because Laing would frequently leave her machine and, in her absence, runners and other foreign material would go into her boxes. Johnson added, however, that when Laing returned to her machine, she would ordinarily go through her box and pull out the unwanted material.

After hearing from Thunder that "something" had been found in her box, and still before Pejskar had undertaken his investigation, Laing called Pejskar and told him that she wanted to come in early, before her shift started, and talk to him about the matter. Pejskar agreed.

When she came in and met with Pejskar, she told him that unwanted material could not possibly have gotten by her. She told him that she knew she could trust him to treat her honestly in whatever decision he made. Pejskar at this point, apparently for the first time, identified for her, the unwanted parts as 3-ounce rotors. He advised her that he intended to go over the machine, along with Thunder, in order to find out how the 3-ounce rotors could have gotten into the 8-ounce rotor box. He told her that if he determined that she was at fault, she would be getting a written warning. Pejskar testified that he felt that a verbal warning was not strong enough because of the seriousness of the situation. He said that he had received complaints from Consolidated Papers before and had visited their plant and personally guaranteed their general foreman that they would not be getting any bad product from Europlast again. He testified further, that while he did not believe suspension or firing was warranted, he wanted something in Laing's permanent file to reflect what had occurred, if it turned out that she was at fault.

During her discussion with Pejskar, on this occasion, Laing suggested the possibility that the material handler, who was responsible for closing the boxes, might have purposely put the 3-ounce rotors in Laing's box. Pejskar took this pos-

sibility into consideration when he subsequently undertook his investigation.

After his discussion with Laing, Pejskar and Thunder went over the whole conveyor system to determine where the 3-ounce rotors could have been hung up, anywhere past the operator, where she could not have seen it. They could not find any way that this could have happened.

They then went into Laing's machine, in the back, behind the safety gate. They knew that the 3-ounce rotors had to have been produced by this particular machine because the oil found on them was only used to lubricate this one machine. In their search they found additional 3-ounce rotors way in the back. They dug some of them out and found them to be covered with the same lubricant. They concluded that the parts returned by Consolidated had somehow been hung up in the back of the machine, just like the ones they had found during their investigation and had, during Laing's 8-ounce run, been shaken loose by the vibration of the machine and dropped onto the conveyor where the operator should have seen them and removed them.

As to Laing's theory that the material handler had put the 3-ounce rotors in her box, they found this to be unwarranted. As Pejskar testified, in order to accomplish this feat, he would have had to shut the machine down in the operator's presence, reach beyond the safety gate to pull out the greasy 3-ounce parts and dump them into her box of 8-ounce rotors unnoticed. He would also have to have known they were there in the first place. Pejskar reasoned that if the material handler wanted to sabotage Laing's box of parts, there were plenty of things to throw into the box without going through the trouble it would have taken to get the 3-ounce rotors from the back of Laing's

Based on his investigation, findings, and reasoning Pejskar told Thunder to go up and tell Olga to write a written reprimand on Laing. In accordance with Pejskar's request, Olga composed the following employee reprimand notification for inclusion in Laing's file:

3 oz Kraft rotors were found by Consolidated Papers (our customer) in 8 oz Kraft rotor boxes that Sigrid was responsible for. Consolidated sent a tag from one box that had 14 3 oz rotors in it. The tag had Sigrid's initials on it. This problem was found in more than one box on that skid. Each individual is responsible for the quality of the product that he or she is working on.

On December 15, Laing was called into the conference room. Thunder handed her the written warning in the presence of Olga and Pejskar and told her the reason why she was being given the warning, as well as how it was determined that she deserved it. She denied that she could have missed the 3-ounce rotors and wrote this on the warning in the space provided for the employee's statement. She could offer no explanation other than that someone else might have put the 3-ounce rotors in her 3-ounce rotor box or that they were already in the box from the previous shift. Pejskar described in full, the investigation, and told Laing that the warning was being given to her because of her carelessness in letting the 3-ounce rotors go past her into the 8-ounce

⁹Laing had been told, in confidence, of the forthcoming layoff by a friend of hers, a clerical, when Laing told her she was thinking of quitting because of pains in her leg. Apparently, the idea was for Laing to stay on until laid off in order to draw unemployment compensation.

¹⁰Laing denied telling Johnson that she would not be coming back after the layoff. However, I credit Johnson.

box. She was shown the 3-ounce rotors and the tag with her initials¹¹ on it. At this point the meeting ended.

After the meeting, Laing went to the lunchroom where the other employees had gathered for a Christmas get-together. She told the employees present that she had just received a written warning and the reason for it. She showed them the warning but proclaimed her innocence, stating that there was no way it could have happened.

Rhonda Stahmer, who was among the group of employees in the lunchroom testified that she was not surprised that odd parts were found in Laing's box because Laing would get up and walk away from her machine and let things fall into her box. She would be gone for 5 or 10 minutes at a time. For this reason, Stahmer testified, she did not like Laing to relieve her at breaktime. She was afraid that Laing would walk away and let bad parts fall into the box with Stahmer's initials on it, and get Stahmer and Respondent in trouble. Stahmer did accept relief from Laing, however, and there were never problems.

On December 15, Respondent laid off all but a few of its employees for economic reasons. Mass layoffs had occurred in each of the 3 previous years and had lasted from a few days to a month. In those years recall was by seniority.

Like in previous years, recall in January 1990 was generally by seniority. After Pejskar requested that Olga recall two machine operators, she called Sharon Johnson for the second shift and Cindy Stahmer, normally a first-shift employee, for the third shift. Although Laing normally worked second shift and had more seniority than Johnson, Olga did not recall her because of the restrictions contained in the doctor's note of December 7. Olga knew that the machine operators who were recalled first would be doing very little actual machine operation and more floor work. Johnson was second to Laing in seniority of all operators on the second shift.

Despite her decision not to call Laing back to work immediately, he called her on New Year's Day. She informed Laing that she would be calling back just one operator on second shift beginning January 2, and that would be Sharon Johnson. She explained that she was calling Johnson back before Laing because of Laing's lifting restriction, that since she was only calling back one operator, that one would have to be able to perform all the duties. Laing raised no objection. It was before she called Johnson that she spoke with Laing.¹²

Sharon Johnson confirmed that when Olga called her to return to work, she told her that Laing would not be coming back because of her work restrictions because of which, she could not lift. She also confirmed the fact that on her return she did mostly floor work which included heavy lifting of boxes and grinders and very little actual machine operation. Johnson remained the only machine operator on second shift for 1 or 2 weeks.

¹¹ Laing denied that she had personally written her initials on the tag. However, there is testimony in the record that sometimes the inspector would put the operator's initials on the operator's box. Laing also denied that the 3-ounce rotors had grease on them when she was shown them. I credit Pejskar and conclude that the oil was there initially but had been subsequently worn off through additional handling.

¹² Laing's description of this New Year's Day conversation is markedly different from Olga's, described above, and is not credited.

During the first week in January 1990, according to Laing, she talked over her situation at work with her husband and together they decided she should quit. Specifically Laing testified that she quit because of sexual harassment, Pejskar's calling her names, and because of her having to perform floor duties. Laing did not advise Respondent at this time of her decision to quit her job.

On January 11, Olga called Laing and asked her if she was ready to come back to work yet. Laing replied that she was not coming back, that after all the things that had happened, she quit. She said that her husband told her she "did not have to put up with that." Laing did not explain what she was talking about, so Olga just said, "Okay," then hung up.

Lucile Gauger

Lucile Gauger is the other of the two alleged discriminatees in this case. Olga hired her on December 15, 1985, and she was among the first few employees hired by Respondent. Initially, Gauger was hired as a machine operator but also had floor duties which included the lifting of boxes and drawers weighing 35 to 50 pounds. In order to lift the heavier items, she would get help from anyone who was nearby.

In 1986, Respondent was known as Courtesy Plastics and was located in Portage, Wisconsin. That year it moved to Endeavor, Wisconsin, and changed its name to Europlast. There was also a layoff that year. Gauger was laid off along with the others and was recalled in order of seniority. This was after the move to Endeavor in May.

In 1988, Respondent had another layoff. Gauger, again, was among the employees laid off. While she was on layoff, Respondent continued to employ at least one employee with less seniority than Gauger. That was Mike Wysznewskij, the brother-in-law of the president of the Company. He was classified as a groundskeeper, material handler, and setup man. It was standard procedure to continue to keep material handlers working while machine operators were on layoff. During this layoff, Mike Wysznewskij was doing yard work. Gauger and the other machine operators were called back by seniority.

Gauger was an excellent employee. In her evaluation in August 1988 she received an "outstanding" or "above standard" in all categories listed in her evaluation. Her evaluation contains several notes of approbation and she was given a raise in wages at the time of her 1988 evaluation.

In 1989, Gauger continued as a machine operator working on at least 10 different types of products. She received an attendance bonus that year and one the next. On February 15, 1989, she received another evaluation in which she was graded as "above standard" or "outstanding" in 13 of 14 categories. In August, Gauger received a wage increase.

In early October 1989, dissatisfaction among the machine operators was not limited to the employees named above, in the section dealing with the discharge of Sigrid Laing, nor to the problem of rotation. There were complaints about wages and working conditions from employees on other shifts. When these complaints came to Pejskar's attention, he gave each employee, on all three shifts, a piece of legal paper and told them to list on it, any problems or suggestions for improvements in the plant, and to return it to him so he could see what he could do to improve things.

Lucile Gauger was one of the employees most outspoken. She told Pejskar that she should be making more money than the other operators. This argument was based either on her feeling that she was the best operator and/or because she had the most seniority. Pejskar replied that he had already changed the wage scale system once, based on an earlier suggestion she had made and it had not seemed to do any good. Gauger then began to complain that evaluations were never getting done on time. Pejskar, at this point, lost patience but nevertheless told Gauger to bring in a list of complaints and he would take it to the office and see what could be done. This conversation took place on October 10.

When Gauger left work that afternoon, she took with her a number of complaints she had gathered from other employees and had them typed. The next morning, she placed the list of grievances on Pejskar's desk. Pejskar testified that he did not know then, and never found out, who had left the document on his desk.

On October 11, Pejskar brought the grievance list to Olga and explained to her that it was the result of his asking the people in production to put together a list of employee complaints and problems. Olga testified that she did not know that Gauger was responsible for having the document prepared.

The same day that Gauger placed the grievance list on Pejskar's desk, but later, toward the end of the shift, an employee on floor duty noticed that defective parts were being run down the conveyor and into the boxes from Gauger's machine. The employee brought this fact to the attention of Gauger's supervisor, Thomas Raudebush. Raudebush investigated and found that the material had become contaminated resulting in a piece off the back of the part sticking to the mold. Two full boxes of parts contained rotors with their backs missing. Raudebush took one of the parts, showed it to Gauger, and told her to watch out for such problems in the future. Later, when Raudebush told Pejskar about the incident, Pejskar told him to write up a warning on Gauger.

All supervisors had, just recently, been given instructions to maintain notebooks and to make entries in these notebooks to be used during evaluations. In accordance with these instructions and Pejskar's order to write up a warning on Gauger, Raudebush made the following notation in his notebook, the very first entry that appears therein:

10-11-89

Lucile failed to catch defective parts while running the 3 oz Kraft in press #4. The knobs on the backside of the parts were missing. She did get a verbal warning.

After making this notation in his notebook, Raudebush reported the incident to Olga as well as the fact that a warning had been ordered by Pejskar. Olga took notes, then on the following day, October 12, 1989, typed up the following Employee Reprimand Notification, to be included in Gauger's personnel file:

Lucile has been inattentive and careless, unacceptable Kraft rotors were packed (parts with backs missing) for approximately 1 hour on 1/11/89. 10,000 pieces were rejected and had to be reground.

As a zero defect supplier, we cannot tolerate this type of behavior. Each individual is responsible for the quality of the product he or she is working on.

Tom Raudebush delivered a verbal warning to Lucile. Next warning shall be a written one.

Raudebush testified, despite the above evidence, that he did not issue a verbal warning to Gauger. To the contrary, I find that he did, albeit at the behest of Pejskar.

Raudebush further testified that he and the other supervisors had been instructed to write in a notebook about everybody on his shift everyday even if it was only that they were there on time. However, Raudebush's notebook contains the names of seven employees and the above entry was the only one for the entire year of 1989. A second entry appears 4 months later, then nothing until March 5, 1990, at which time, Raudebush began making daily entries, as he described, until April 4, 1990, on which date he stopped. Thus, it is clear that the entry concerning Gauger was an isolated incident, not part of an overall, systematic, daily record-keeping of the doings of all employees as Raudebush portrayed. Why he had to make daily entries in March 1990 is unclear from the record but certainly could have nothing to do with the union campaign or election which by that time was long over.

Raudebush also testified that the incident which occurred on October 11, and which gave rise to Gauger receiving the verbal warning, occurred after he was told to watch closely and document the activities of certain people who were suspected of engaging in union activities. This testimony is clearly in error and is not credited since, as of October 11, no union activity had yet taken place. On the other hand, Olga's testimony to the effect that the instructions to supervisors to keep notes on various daily incidents was for purposes of evaluation, and predated the union organizing campaign is credited.

On October 12 or 13, 1989, Olga met with Nick Wysznewskij and Harold Zacharias to discuss with them the grievance list. At this meeting, they decided to meet with the employees concerning the problems mentioned in the list. Subsequently, Olga posted a notice in the lunchroom announcing the forthcoming meeting.

On Monday, October 16, Gauger called the Union in Chicago and made arrangements with Jerry Gustafson, union representative, to meet with him the following day in Portage, Wisconsin. Gauger, accompanied by employee, Donna Hinze, met with Gustafson, discussed problems at the plant and obtained authorization cards which they divided between themselves. Then Gauge went to the plant where she gave 8 or 10 cards to Laing. During lunchbreak, in the cafeteria, she obtained the signatures of Sharon Johnson and Sandy Millard on union cards.

Hinze asked a couple of people how they felt about the Union, signed a card herself, and obtained the signature of one other employee.

On October 18, Gauger went to work at 6:30 a.m. and went directly to quality control where she gave employee, Sharon Bullen, a union card which she signed and returned immediately. Later, in the restroom, she got Laing's cards from her. While there, she obtained the signature of Cindy Stahmer on a card. She later asked employee, Wayne Johnson, if he had filled out the card she had given him earlier.

He replied that he had not yet done so, but would get back to her.

At the break, Gauger obtained from employee Donna Hinze the cards which she had collected. After visiting Cindy Stahmer's home, where they picked up another card, she and Laing went to a restaurant in Portage where they met Gustafson and delivered the signed authorization cards.

Earlier that day, at work, Gauger and Laing were looking through the door, out toward the highway, expecting to see Gustafson passing out cards. Olga came by and asked them what they were doing. Laing replied that they were "just looking around."

It was on October 18 that Gustafson showed up at Respondent's plant and passed authorization cards and union literature out to the employees who were in the process of changing shifts. This was the day, also, that Olga had posted the notice about meeting with the employees to discuss their grievances. She immediately went to the bulletin board and took down the notice. She testified that she took down the notice because she did not know whether she had a legal right to meet with her employees concerning grievances during a union campaign.

Laing, who was present at the time, testified that when Olga removed the notice, she came storming into the lunchroom, tore the paper off the wall, crumpled it up, and threw it in the garbage, stating angrily that there would be no meeting.

Olga testified that no one in management was aware of any union activity prior to October 18. On that date, about 45 minutes before Gustafson appeared in or near Respondent's parking lot, Respondent's janitress, Suzy Kluge, came in and told Olga that there was union organizing going on. According to Olga, Kluge did not identify the union activities and Olga did not ask who they were. Olga admitted that when she heard about the union activity among her employees she was shocked, surprised, angered, and hurt. Olga's denial notwithstanding, I cannot believe that Kluge did not identify one or more of the activists, at this time, or with the admitted reaction that Olga felt, she did not ask.

Olga, who had had previous experience with union organizing campaigns, immediately called her lawyer, as well as a meeting with other members of management. At this meeting, she told them not to speak to anyone concerning the union activities, to be quiet about it. She said that Respondent was not permitted to punish employees for engaging in union activities, to question employees about their activities, or to promise them anything for not engaging in such activities. Olga advised them that Respondent's attorney would be up the following day to give them more complete instructions.

Raudebush was called as a witness for the General Counsel. He had attended the October 18 management meeting and, for the most part, supported Olga's testimony as to what occurred.

After October 18, additional management meetings were held. According to Olga, the same instructions were given at these meetings as were given at the first meeting and nothing was said or done to the contrary. Raudebush testified, however, that during the later meetings, the supervisors were told that although they were not to discuss union activities with employees, it was all right for them to listen, determine from what they were told whether an employee was for or against

the Union, and to make a list of pronoun antiunion employees.

According to Raudebush, during management meetings, held after October 18, and in private conversations with other members of management, it was indicated that management was aware of which employees were involved with the Union. Gauger, Laing, Bullen, and Hinze were so identified. Raudebush testified that he was told to keep a closer eye on, and to take notes on these individuals. He was told to document anything they did wrong. He said he could recall conversations with management officials concerning "what might lead to particular employees not working for the company anymore." Raudebush did not, however, recount any of these alleged conversations, except to say that Pejskar told him, more than once, that if they made life miserable for the four union activists, they would not have to worry about them anymore. Raudebush, however, could not recall when Pejskar made this statement, whether before or after the election.

With regard to Raudebush's testimony, Pejskar denied making the statements attributed to him and Olga denied that supervisors were ever instructed to pay special attention to Gauger and Laing in their notetaking procedure had nothing to do with the union organizing campaign. I credit Pejskar's and Olga's denials. Indeed, Raudebush's notebook contains absolutely no entries, whatsoever, for the period covering the union campaign, the election, or the weeks immediately following.

Beginning October 21, Respondent held a number of meetings with employees to dissuade them from supporting the Union. There is no evidence that Respondent violated the Act during these meetings and no violations are alleged in connection with them. At some of these meetings, however, Olga noticed that Gauger seemed to have an impatient air about her. She seemed unhappy. When Gauger left one particular meeting, Olga heard Gauger remark, "This is bullshit." She got the impression from this that Gauger was in favor of the Union.

In addition to holding meetings, with employees and among themselves, members of management would individually discuss with each other how they thought certain employees might vote. The purpose was to gauge the progress of their efforts in trying to persuade the employees to reject the Union. It was pretty much agreed among members of management that Gauger would vote union.

At the time of the layoff, on December 15, Gauger was still working as a machine operator in the molding department, on the first shift. She was the most senior machine operator but was laid off along with all the other operators.

During the period of the layoff, Mike Wysznewskij continued to work. He is Olga's younger brother and was a college student at the time. As was the case since 1986, whenever he was on vacation from school, he would work at Europlast. Similarly, whenever he was on vacation from school, he would work at Europlast. Similarly, whenever there was a layoff at Europlast, he would not be affected, but would continue to work.

Mike Wysznewskij, in December 1989, was apprenticing as a setup man, putting in and taking off molds for different jobs. He also did some sampling, which involved testing new molds. He also did some machine operator's work for 2 days. He worked from December 12 until the last week in

January. Some issue was taken, at the hearing, with regard to Mike Wysznewskij doing machine operator's work while Gauger and Laing remained on layoff. I find, however, that Respondent was merely engaged in nepotism, a sin not covered by the Act.

Toward the end of December, Olga and Pejskar discussed the matter of recall of machine operators during the first week of January 1990. It was Pejskar's job to determine how many employees should be called back, in what categories and on what shifts. It was Olga's job to decide which employees to recall to fill the positions Pejskar wanted to fill.

Pejskar determined that most of the work being done, in early January 1990, would be setup work and sampling. Mike Wysznewskij was already doing this and Pejskar decided he should continue to do it. There was just 2 days work for machine operators. Some of the machines were running on automatic and there was little for them to do. For this reason Pejskar told Olga to recall two machine operators, one for the second shift and one for the third shift. Pejskar had in mind that whatever little machine operator work there was to do on the first shift could be done by Mike Wysznewskij, so there was no need to call in one of the regular first-shift operators. Consequently, Gauger, the machine operator with the most seniority would not be called. Pejskar also expected that the recalled machine operators on the second and third shifts, after performing their machine operators duties, would help out on the floor, thus permitting the material handler and supervisor to do some mold changing.

After calling Sharon Johnson to work the second shift, Olga called Cindy Stahmer, the first-shift machine operator, with the least seniority. She offered her the opening which Pejskar requested on the third shift. Olga credibly testified that she made the offer to Stahmer because the amount of work available for the operators had decreased to the point that management felt there was not going to be enough work to employ three operators anymore on first shift. Olga believed that the other first-shift operators would all prefer to remain on first shift when recalled so she chose Stahmer for the third shift job because she had the least seniority and had initially worked on third-shift before transferring to first shift. Olga advised Stahmer that her transfer back to third shift was permanent.

Another employee recalled to work on January 3, long before Gauger, was Sandra Millard. Although Millard did, in fact, have less seniority than Gauger, she had not been a machine operator since the previous October. From October 1989 through the period of the layoff Millard was in quality control and was recalled to that position. Her recall did not affect the machine operators.

About January 4 or 5, Gauger both called Olga by phone and visited her at her office because she had heard that Stahmer and Johnson had been recalled and she had not. She wanted to know why she was not back at work. She complained that she had more seniority than either Stahmer or Johnson. Olga explained the situation with regard to each and said that she had not believed that Gauger was willing to work on any shift other than the first. Gauger rejoined that she would if she had to. She asked Olga how long Mike Wysznewskij would be working. Olga replied that he would be on the job for 4 or 5 weeks and explained how he was needed as a setup and sample man. Gauger then said she would be willing to bump other people on other shifts be-

cause she had more seniority and wanted to work. Olga explained that the way things were then, the situation was just temporary. She said that she did not want to start bumping people around because she would then have to start looking for people when their shifts started up again. She promised Gauger that she would be the next operator called back to the first shift.

True to her word, Olga called Gauger on January 11 and told her to report for work on January 12 on the first shift. Within the next few days, machine operators were called back to all shifts, virtually all in accordance with seniority. This included the rest of the first shift.

Gauger signed the notice of available position for the job of floor person when it was posted February 5. As the most senior machine operator, she was the first one called in for an interview. At the interview, Olga explained to Gauger what the floor person's duties and wages would be. Pejskar said that he expected the floor person to perform all the duties listed on the notice without assistance from anyone, since she would be expected to run the floor by herself. Gauger indicated she could meet all the requirements except for stacking the fourth box on the stack. She asked if there was any way someone, the material handler or maintenance man, could assist her in just doing that part of the job, lifting boxes. Pejskar replied that the reason he was posting the job was because he wanted someone who could do the job 100 percent, on a full-time basis without assistance from anybody. He explained that there was not always going to be someone there to help her. Of course, he told her, if George Smith, the material handler, for instance, was just standing around doing nothing, he could help. But if Smith was working with the supervisor doing mold changes, which was going to be the main job of the material handlers, from then on, Pejskar did not want him interrupted to assist the floor person. She would have to be able to do the entire job by herself. He pointed out that Gauger had known the requirements of the job because they had been listed on the notice. He told her that if she could not do the job, she should not have signed up for it. He added that if he had to, he would hire someone off the street. Gauger rejected the position. Gauger's rejection of the floor person's position meant that she would remain on the job as a machine operator, at least as long as the job lasted.

On February 21, Cindy Stahmer found a short part, an 8-ounce Kraft rotor, in Gauger's box. She immediately brought it to the attention of the shift supervisor, Raudebush, who took the part back to show to Gauger. He told her to watch out for similar defective pieces, then made a notation in his notebook describing the incident. He finished his note with the words, "See Reprimand Notice." Thereafter, Raudebush reported the incident to Pejskar. Pejskar asked Raudebush what he wanted to do about it and Raudebush replied that he thought they should write Gauger up, give her a written warning. Pejskar said, "Okay, go up and see Olga, have her draw up the papers, and set up a date when you want to take care of it."¹³

¹³ The incident, as described in the text, is based on Pejskar's credited testimony. Raudebush testified that he wrote the reprimand only because he was told to do so and because he was told "around when the union stuff started" to "take notes on Gauger and some other employees." Raudebush appeared to be testifying to mostly leading questions, that he was given such instruction both in the fall

On February 23, Gauger was called to a meeting with Radebush, Pejskar, and Olga where she received the following employee reprimand notification:

COMPANY STATEMENT OF VIOLATION:

Lucile has been inattentive and careless, unacceptable 8 oz Kraft Rotor (short part) was found in a box that Lucile was responsible for on 2/21/90. As zero defect supplier, we can not tolerate this type of behavior. Each individual is responsible for the quality of the product that he or she is working on.

EMPLOYEE STATEMENT:

Since the conveyor was moved, the runners get caught all the time, I didn't have enough time to watch both ends of card board wedge—as parts get caught in between

Signature *Lucile Gauger*

COMPANY DECISION:

This shall be considered the first written warning for carelessness and poor work quality. If this occurs again, Lucile shall be issued a second written warning, and thereafter terminated.

Each employee notification is considered for 1 calendar year from the issue date. These notices are on file in the personnel office.

The reprimand notice was signed by Gauger, Radebush, and Olga, but not Pejskar.

Gauger testified that she should have gotten a verbal warning before she received the written warning of February 23, 1990. As noted earlier, she received a warning on October 11, 1989, before the Union began organizing. This warning was memorialized by Olga, on October 12, as an employee reprimand notification, and bore as the *company decision*:

Tom Radebush delivered a verbal warning to Lucile, the next warning shall be a written one

Neither counsel for the General Counsel nor the attorney for the Charging Parties questioned the authenticity of this document.

On February 27, Radebush again offered Gauger, and said that he had been told to offer her, a floor person's job, this time on the second shift. Gauger answered, "Do you thing [sic] I'm crazy. Olga didn't want me to have it." Radebush said, "I told them you wouldn't take it."

In March 1991, when floor persons' positions were about to open, due to the fact that two floor persons bid and won Kohler assembler jobs, Olga called Gauger to determine if she were interested in either of the newly available floor person's jobs. Gauger replied that she would have to have the

of 1989 and in February 1990, that he followed these instructions and took additional notes on Gauger and others between these periods and could not account for their absence. He could not testify as to the content of the missing notes or to the dates they were written. I do not credit Radebush.

offer in writing for her attorney. Olga promised Gauger a letter by the following morning. On March 1, 1991, Olga wrote the following letter:

March 01, 1991

Ms. Lucile Gauger
P.O. Box 48
Endeavor, WI 53930

Dear Ms. Gauger:

One second shift floor person position and one third shift floor person position have become available.

Based upon what I have seen on claims that you have filed, it appears that you may have misunderstood what was required of a floor person. I am therefore offering you the opportunity to apply for one of these available positions.

The following are the responsibilities of the floor person:

- Packaging-Labeling-Inspecting-Sorting
- Weighing Boxes
- Dumping Grinders
- Giving Breaks
- Making Boxes
- Cleaning
- Lift objects weighing up to 50 pounds on a regular basis
- Have a working knowledge of basic arithmetic skills
- Operate injection molding presses as needed
- Perform secondary operations as needed

We encourage our employees to help others if they are busy, so there may be occasions that someone might help you with some aspect of your job, but you must be able to do all of duties listed above competently and efficiently by yourself.

The position will be available beginning March 11, 1991. The base starting wage for that position is \$5.50 per hour.

I need to know of your decision by 12:00 noon Monday March 04, 1991, so that I may contact other sources if you are not interested in accepting employment.

Sincerely,
Olga Zacharias
Manager

After receiving the above letter, on or about March 2, Gauger talked with her attorney, then went to the plant and spoke with Olga. Olga told Gauger to check with her doctor because she had heard that Gauger could not perform all of the duties required by the job. Gauger then went to her chiropractor and her doctor and was advised of certain restrictions to her working. She then composed the following letter, which she hand-delivered to Olga at the plant on the afternoon of March 4:

March 4, 1991

Olga Zacharias
Personnel Manager

I accept the job as floor person while the interrogation of damages are being investigated.

I understand that my inability to lift the boxes four high will be compensated for me at that time.

I expect that there will be no retaliations against for my charges filed with the NLRB and DIHLR against the Company.

Per your request, I will report to work at Commencement of 2nd shift on March 11, 1991.

Sincerely,
Lucile Gauger

Olga accepted the letter and said she would read it. The contents of the letter were not discussed. There was no discussion about lifting being a limitation on her accepting employment. All Gauger actually said, at the time, was that she would report on March 11, second shift.

When Olga got around to reading Gauger's letter, she decided that she did not quite understand what was meant by certain parts of it. On March, she wrote another letter to Gauger:

March 05, 1991
Ms. Lucile Gauger
P.O. Box 48
Endeavor, WI 53930

Dear Ms. Gauger:

By way of telephone and letter, on March 1, 1991, I offered you an opportunity for a floor person position, a job which you declined in 1990. Based upon what I had heard since your 1990 layoff, my impression was you turned down the job in 1990 because the job duties were other than you thought them to be.

Such being the case, I attempted to be as clear as possible in my March 1, 1991 letter regarding job duties. That is the job being offered, whether you accept it or someone else accepts it.

Your March 4, 1991 letter to me, while not clear, equivocate as to what job you are willing to accept.

If you have a handicap which prevents you from doing certain functions, it needs to be identified by you, and it needs to be medically verifiable to our satisfaction. Should that be established, we remain willing to explore avenues of reasonable accommodation. However, a bare representation that you are "unable" or "can't" perform certain necessary job functions is not a solution.

Having clarified these matters again, I understand that you will report for the 2nd shift floor person position on March 11, 1991.

I am looking forward to starting with a clean slate on March 11. Both you and I know our differences as to past events will be resolved through the legal system. I certainly do not intend to have those differences affect our future working relationship. If you have any problem at work which you believe to be discriminatory or retaliatory, I certainly hope you will immediately bring

it to my attention and give me a fair opportunity to resolve it.

Sincerely,
Olga Zacharias
Personnel Manager

Upon receiving Olga's March 5 letter, Gauger obtained three notes from her doctor and her chiropractor and brought them in and gave them to Olga on Friday, March 8.

The three notes read as follows:

3-06-91

61 "S-Pt relates she has a new job that requires her to stack 30-35# boxes in stacks that are 4 deep. Pt does fine with 1st 3 boxes but has difficulty straining with 4th box. Feels concerned with possible back strain and possible damage to bladder region.

I feel these concerns are legitimate for this patient. Note written—See copy.

R. E. Christianson, M.D.

March 6, 1991
Europlast
Endeavor, WI 53930

Re: Lucile Gauger

I have advised Lucile that she is to limit her lifting to not over twenty (20) pounds when she has to place items above mid chest heights. I have advised her particularly that she should not stack the 4th box in her regular work.

Sincerely,
R. Duane Marshall, D.C.

Lucile Gauger

3/6/91

RX

Lucile has reviewed her job with me. I do not feel she is able to stack the boxes she is working greater than a stack 3 boxes deep.

Going higher than this could have a definite negative impact or [sic] her back.

R. E. Christianson, M.D.

Prior to receiving the three notes from Gauger, Olga had not had any conversations with her about lifting restrictions. When she received them from Gauger, Olga told her she would look them over and get back to her. She then showed them to Pejskar who went over production to determine what products were being produced at the time. He concluded that with the restriction contained in the notes, Gauger could only do about 40-80 percent of the work required of a floor person which was mostly lifting.

Pejskar's analysis of the demands of the position was done over the weekend. By Monday he had concluded that awarding the position to Gauger would cause a major problem. She could not do the job. He tried to contact Gauger's attorney but was unable to do so. Finally, after waiting, in vain, to hear from Gauger's attorney, it was decided to fill the posi-

tion with someone else because there was a deadline to meet. Parts had to be run.

On Monday, March 11, about 11:40 a.m., Gauger first called her attorney, then, at his instruction, called Olga to see if she had the job. Olga, at that time, told Gauger that she did not know, that she would have to talk further to her attorneys. That afternoon, Olga called Gauger back and told her not to come to work, that she had nothing, at that time, that Gauger could do. She also told her that if she were interested in further employment, she should fill out an application. Gauger did fill out an application but made further efforts at obtaining employment with Respondent.

On March 20, Gauger was placed under her doctor's care, to be hospitalized, for an injury she had incurred the previous January 25 due to a fall in the parking lot. From the time of her accident until March 20, she had continued to perform her duties as a machine operator. Gauger remained on sick leave until May 29, 1990. Meanwhile when the machine operators' jobs were eliminated on March 30, Gauger was one of the six operators laid off. She was not informed of her layoff at the time because she was in the hospital recovering from surgery. Olga spoke with Gauger's nurse who advised her not to tell Gauger, at that time, that she was permanently laid off for fear of upsetting her.

On April 18, Gauger visited the plant to get some insurance papers filled out. While there, Olga informed her that the job of machine operator had been eliminated. Gauger replied that she had heard this and asked if she could have a recommendation for employment. Olga complied and gave her a favorable one. Olga advised Gauger to go right on unemployment compensation as soon as she got off workman's compensation.

As noted earlier, Gauger filed a charge against Respondent on May 21 which was served on May 23. On the latter date, Gauger called Olga and told her that as of May 29 she would be released by her doctor to return to work. Olga advised Gauger that, as she had already been told, her job had been eliminated and there was no work available. She added, however, that if Gauger were interested in temporary employment, she should let her know.

Two days later, Olga credibly memorialized her May 23 conversation with Gauger in a letter dated May 25:

Dear Lucile:

This will confirm our telephone conversations of May 23, 1990. Based upon those conversations it is my understanding that effective May 29, 1990, your doctor has released you for work. Please forward that release, or a copy thereof, to me for my records.

As you are aware, due to automation all operator positions have been eliminated as regular full-time positions. This change is intended to be permanent and therefore your former job is no longer available.

Europlast, Ltd. is utilizing persons to do operator work, but only on a temporary and irregular basis. As I told you on May 23, 1990, such temporary work can be made available to you, if you are interested. Your response to me on May 23, 1990, was that you did not know if you wanted the work. You offered me no explanation as to why you would not want such work.

If you are interested in this temporary employment, as it becomes available, please inform me, personally,

no later than close of business on May 30, 1990. If I do not hear from you by that date, I will assume you have no interest in such employment.

Outside of the temporary operator positions, there are no available positions at this time. Should you wish to inquire again in the future, please call me.

Finally, as to unemployment compensation, please feel free to provide the government office with a copy of this letter.

Very truly yours,
Olga Zacharias
Personnel Manager

After receiving Olga's letter, Gauger visited her attorney who advised her to write Olga a letter "due to her inaccuracies" stating that she would accept either temporary or full-time employment. In accordance with her attorney's instructions, Gauger wrote the following letter:

5-30-90
2:30 p.m.

Dear Olga,

After I talked to you I thought I had best send a letter stating that I am interested in temporary work or full time work now or at later date.

I want to correct you, by my notes on May 23, I did not say that I did not know if I wanted the work, you told me there was no work, when I asked you about my Dr release to come back to work. You also told me I was permanent laid off.

Truly yours
Lucile Gauger

Although Gauger's notes were offered to support much of her testimony on other subjects, none were offered to support her testimony with regard to her conversation with Olga on May 23.

Analysis and Conclusions

The complaint alleges¹⁴ that Respondent, on December 15, 1989, issued a written warning to Sigrid Laing and, on February 23, 1990, issued a written warning to Lucile Gauger because of their activities on behalf of the Union, and in violation of the Act.

The facts outlined above clearly indicate that in the spring of 1989 management was extremely concerned about defective parts being shipped to its most important customer. A meeting was held with the employees during which this concern was expressed and employees threatened with discipline if they should permit defective parts to be shipped out in the future. When, on October 11, Gauger failed to catch defective parts, she was given a verbal warning. At the time, the Union was not yet on the scene.

On December 15, 1989, Sigrid Laing received a written warning and, on February 23, 1990, Lucile Gauger received a similar warning, both for failing to catch defective parts. I find the warnings were given in accordance with past prac-

¹⁴ Par. 5.

tice and for good cause and had nothing to do with the union activity of the alleged discriminatees.

The complaint alleges¹⁵ that Respondent failed to recall Gauger and Laing, in accordance with seniority, as it had in the past, because of their union activity. Respondent, however, through credited witnesses, fully explained why Gauger and Laing were not recalled, strictly in accordance with seniority. I find the recall was determined by Respondent's operational requirements and had nothing to do with the union activities of Gauger and Laing.

The complaint alleges¹⁶ that Respondent, on or about May 29, 1990, refused to recall Lucile Gauger to her former job and/or discharged her because of her union activities. I find, however, that Respondent refused to recall Gauger because, with the restrictions contained in the notes from her doctors, it was clear that she could not do the job. There is no evidence that her union activities were a consideration.

The complaint alleges that in October 1989¹⁷ Respondent required Laing to perform jobs requiring prolonged standing, despite knowledge of a medical condition precluding this activity; continued to require Laing to perform such duties until her layoff on December 15, 1989; and constructively discharged her by offering to recall her to work under the same conditions.

The facts of the case, fully outlined above, indicate that Laing was removed from her "most favored employee" situation, and required to perform all of the duties of the machine operator's position, including floor duties, because the other machine operators complained about her not doing her share of the work. When the personnel manager described

Laing's duties to her doctor, he said that Laing could perform them and, in fact, it would be good for her to do so.

When Laing was recalled on January 11, 1990, neither her duties nor her restrictions were discussed. Since she was working on light duty, under doctor's orders, before the layoff, and was still under those same orders when recalled, it must be assumed that she would be performing light duty upon her return. There is no evidence to the contrary. I find that Laing informed Olga on January 11, that she quit and that, in fact, she did so, and was not constructively discharged.

Having found that none of the allegations of violations contained in the complaint are meritorious, I shall recommend that it be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not committed any of the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The complaint is dismissed in its entirety.

¹⁵ Par. 6.

¹⁶ Par. 7.

¹⁷ The date which actually appears in the complaint, October 23, 1990, is clearly a typographical error.

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.